

ESTATE OF OLLIE BOURBONNAIS  
GLENN SMITH

: Order Affirming Decision  
:  
: Docket Nos. IBIA 93-124  
: IBIA 94-10  
:  
: November 3, 1993

This is an appeal from a July 29, 1993, order denying petition for rehearing/reopening issued in this estate by Administrative Law Judge Richard L. Reeh. Appellant James W. Phipps Smith is the grandson of Ollie Bourbonnais Glenn Smith (decendent), who died on January 14, 1949.

The initial order in decendent's estate was issued on April 12, 1950, by Examiner of Inheritance R.J. Montgomery. The order approved a will executed by decendent on October 7, 1931, which disposed of a 5.41-acre tract of trust land. The Examiner determined that, under the will, a portion of the tract, consisting of approximately 1½ acres, passed to decendent's non-Indian husband, Roy Earl Smith. He further determined that, as to the remainder of the tract, an undivided 3/4 interest passed to appellant and an undivided 1/4 interest passed to Roy Earl Smith.

On September 25, 1951, Roy Earl Smith conveyed the 1½-acre tract to L. M. Brown and Helen Ruth Brown.

Decendent's estate was reopened on April 17, 1953, by Examiner of Inheritance J.R. Graves, following discovery of a later will executed by decendent. By this will, dated November 20, 1939, decendent devised her entire 5.41-acre tract to appellant, stating that she was leaving nothing to her husband. Examiner Graves approved the 1939 will on October 26, 1953.

On March 24, 1958, L. M. Brown and Helen Ruth Brown filed a petition for reopening and modification, stating that they had purchased the 1½-acre tract from Roy Earl Smith in good faith and in reliance upon the April 12, 1950, order; that they had not been given notice of the 1953 reopening proceedings; and that the October 26, 1953, order was invalid because it was entered without proper notice. Examiner Graves informed appellant of the petition and gave him an opportunity to respond. Appellant filed a response, objecting to the petition and requesting that the Examiner issue an order reaffirming his 1953 order, i.e., showing that the entire 5.41-acre tract passed to appellant.

On June 13, 1958, Examiner Graves issued an order excluding the 1½-acre tract from the October 26, 1953, order. He stated, inter alia, that the sale of the tract to the Browns, "having been completed prior to the reopen-

ing of the estate in April of 1953, vested fee simple title to the \* \* \* 1½ acres in Mr. and Mrs. Brown; and such title could not be disturbed by any subsequent probate proceedings of this Department (1958 Order at 2).” Appellant did not appeal from the 1958 order.

On May 27, 1993, appellant filed a petition for rehearing/reopening, claiming that the Bureau of Indian Affairs (BIA) was negligent in failing to locate the 1939 will prior to the original probate proceeding. Judge Reeh denied the petition on July 29, 1993, stating in part:

The record reflects that all interested parties, including [appellant] received the 1958 Order of Modification which provided that it became final 60 days after June 13, 1958. No Petition for Rehearing was filed with the Superintendent, although correspondence reflects that [appellant] discussed the substance of issues he now complains of with Examiner of Inheritance Kent R. Blaine in 1962.

On the basis of information in the record of this case as well as allegations contained in the instant “Petition” \* \* \* it is apparent that 43 C.F.R. § 4.242 requires denial of relief. [Appellant] fully participated in the 1958 considerations. More than three years elapsed since entry of the [1958] Modification. In fact, 35 years have elapsed. No reasonable possibility exists in this forum for reasonably granting any of the relief [appellant] requests, although it is apparent that a BIA oversight resulted in his failure to receive a 1.5 acre tract.

Appellant’s notice of appeal from this order was received by the Board on September 13, 1993. 1/ The Board has received the probate record and reviewed it.

Normally, appellants before the Board are given a briefing schedule in accordance with the provisions of 43 C.F.R. 4.311. However, when a notice of appeal shows on its face or in conjunction with the probate record that under no set of circumstances can the appellant prevail, the notice may be addressed without further briefing. Estate of Richard Lip, 15 IBIA 97 (1987).

Appellant’s petition for rehearing/reopening was exceedingly untimely. Under the Department’s probate regulations in effect in 1958, as well as those in effect today, a petition for rehearing must be filed within 60 days of mailing of the decision for which rehearing is sought. 25 C.F.R. 15.17 (1958); 43 C.F.R. 4.241(a) (1992). Further, under both sets of regulations,

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1/ Appellant’s notice of appeal was entitled “Petition for Rehearing/Reopening.” Appellant sent a copy to Judge Reeh who construed the filing as an attempted successive petition for rehearing, which was prohibited by 43 C.F.R. 4.241(e). He therefore issued an order dismissing the petition on Oct. 12, 1993. Appellant filed a second notice of appeal from the Oct. 12 order. Both of appellant’s notices of appeal are addressed by this order.

a petition for reopening may be filed only by a person who had no actual notice of the original proceedings. 25 C.F.R. 15.18 (1958) ; 43 C.F.R. 4.242(a) (1992).

Appellant was not entitled to petition for reopening because he had notice of and participated in the 1958 proceedings. Although he was entitled to petition for rehearing within the time limit provided by the regulations, he failed to do so. Accordingly, Judge Reeh's order may be summarily affirmed based on appellant's failure to file a timely petition for rehearing.

Judge Reeh also held that he had no authority to grant the relief requested by appellant. Appellant sought recovery of the 1½-acre tract and its reinstatement to trust status, or, in the alternative, monetary compensation from BIA. The authority of the Department of the Interior to probate the estates of Indians is limited to property in trust or restricted status. Neither Judge Reeh nor this Board has jurisdiction over land once it has passed out of trust status. 25 U.S.C. §§ 372, 373 (1988); Estate of Pansy Jeanette (Sparkman) Oyler, 16 IBIA 45 (1988). Further, neither Judge Reeh nor this Board has the authority to require BIA to compensate appellant. Kays v. Acting Muskogee Area Director, 18 IBIA, 431 (1990). It is apparent that, even if appellant had filed a timely petition for rehearing, neither Judge Reeh nor this Board could grant him any relief.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. 4.1, Judge Reeh's July 29, 1993, order is affirmed.

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Anita Vogt  
Administrative Judge

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Kathryn A. Lynn  
Chief Administrative Judge